

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TERESA SALCEDO**  
Claimant

VS.

**IBP, INC.**  
Respondent  
Self-Insured

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 140,714

**ORDER**

On the 9th day of February, 1995, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Thomas F. Richardson, dated December 5, 1994, came on for oral argument by telephone conference. Appeals Board Member Gary M. Korte has recused himself from these proceedings and Board Member Pro Tem Jeff K. Cooper will participate in this review.

**APPEARANCES**

Claimant appeared by and through her attorney, Mike Allen of Liberal, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Pamela L. Falk of Emporia, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Michael T. Harris of Wichita, Kansas. There were no other appearances.

**RECORD**

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as specifically set forth in the Award dated December 5, 1994.

**STIPULATIONS**

The stipulations set forth by the Administrative Law Judge in his Award dated December 5, 1994, are hereby adopted by the Appeals Board for purposes of this Order.

**ISSUES**

The issues presented by oral argument for decision by the Appeals Board are:

- (1) Nature and extent of claimant's disability;
- (2) Future medical treatment; and
- (3) Entitlement to vocational rehabilitation benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The claimant, Teresa Salcedo, while working for the respondent, IBP, Inc., sustained an injury by accident on July 21, 1989. The claimant injured her arms and back while working in the meat packing plant and using a hook in her left hand to pull pieces of meat toward her. As a result of using the hook to pull meat she began experiencing pain in her back, shoulders, and neck. The claimant continued to work for respondent through September 26, 1989. Claimant was, according to her testimony, dismissed from her employment and advised that when she was well again she could come back and do her work. Evidence in the record does not disclose whether this was a permanent layoff or only a temporary layoff.

The claimant was treated by Dr. Zeller and various other doctors subsequent to the injury. Claimant was also seen by Dr. John B. Jarrott on April 17, 1990, and five subsequent examinations. Dr. Jarrott testified that claimant had a functional overlay of a significant degree. Dr. Jarrott's ultimate rating was five percent (5%) to the body as a whole. EMG and other diagnostic tests performed by Dr. Jarrott were normal. Dr. Jarrott further was of the opinion that any back difficulties suffered by the claimant were not attributable to the original injury. Dr. Jarrott was unable to determine any orthopedic problem that could produce the weakness complained of by the claimant. Range of motion tests on the shoulders were normal. Claimant also made complaints about numbness and weakness in her legs which Dr. Jarrott testified were not causally related to her employment at IBP. It should further be noted that Dr. Jarrott initially saw claimant at the request of her attorney.

Claimant was also seen by Dr. John W. Ellis on one occasion on February 22, 1993. Dr. Ellis diagnosed fibromyalgia of the posterior cervical thoracic and shoulder girdle muscles, bilateral brachial plexus impingement, and bilateral peripheral vascular impingement in the girdle areas. Dr. Ellis believed that the repetitive work in the cold environment at respondent, IBP, made claimant's muscles more prone to strain. The straining of the muscles in the back, neck and thoracic area caused pinching of the blood vessels and nerves down into her arms which caused the fibromyalgia in her neck, thoracic area, and tingling in her arms. Dr. Ellis was of the opinion that claimant had a thirty percent (30%) permanent partial loss of function of the body as a whole as a result of her work-related problems. Dr. Ellis also restricted claimant to lifting no more than fifteen (15) pounds on an occasional basis and no repetitive work with her upper shoulders and neck. On cross examination, Dr. Ellis indicated that his examination was a legal medicine exam and that he was not a treating physician and the claimant was sent down by claimant's attorney for his review, "probably to make money for us." Dr. Ellis also stated that his opinions were based upon subjective responses and subjective tests he performed.

Claimant was also examined and evaluated by Dr. Philip R. Mills, who diagnosed generalized fibromyalgia. Dr. Mills indicated that there were no objective abnormalities in claimant's shoulder, cervical, thoracic, or lumbar spine. Range of motion was normal in those areas as well. Dr. Mills indicated that fibromyalgia was muscle pain and opined that the claimant suffered a five percent (5%) permanent partial impairment to the body as a whole, due to the fibromyalgia. Dr. Mills found no evidence of any of the other abnormalities diagnosed by Dr. Ellis. Dr. Mills did not place any restrictions on the claimant

and, in fact, encouraged her to be active. Dr. Mills felt that activity would have a positive effect on her as an individual. Dr. Mills also indicated that most commonly the diffuse muscle pain exhibited by the claimant would be idiopathic and, therefore, not related to her work. Dr. Mills could not attribute the five percent (5%) permanent partial impairment of function based on the fibromyalgia as being causally related to the July 21, 1989 accident.

Claimant was also evaluated by James Molski, a vocational specialist, who based his opinions on work disability on the medical reports of various doctors. Utilizing Dr. C. Reiff Brown's and Dr. Mills' reports, which indicate that claimant had no work restriction, Mr. Molski opined that the claimant would have no loss of access to the open labor market and no wage loss, therefore, no work disability. Utilizing the diagnosis and opinions and restrictions of Dr. Ellis, claimant would have a sixty to sixty-five percent (60-65%) loss of access to the open labor market and a forty-four to fifty percent (44-50%) loss of ability to earn comparable wages.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 1989 Supp. 44-501(a).

The burden of proof is also defined by K.S.A. 1989 Supp. 44-508(g).

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden of proof must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to assess the medical testimony, along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board finds that, based upon a review of the entire record, that claimant has not met her burden of proof in establishing any disability above the functional rating. In this case, the greater weight of the medical evidence, and in particular, the opinions of Dr. Jarrott and Dr. Mills, finding that the claimant has a five percent (5%) functional impairment and no work restrictions are more persuasive than the opinion of Dr. Ellis. It is the opinion of the Appeals Board that the claimant has suffered a five percent (5%) permanent partial impairment to the body as a whole.

Claimant is entitled to future medical upon proper application to and approval by the Director of Workers Compensation.

Unauthorized medical of up to \$350.00 is ordered paid to or on behalf of claimant upon presentation of proof of said expense.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, shall be, and is hereby, affirmed.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Teresa Salcedo, and against the respondent, IBP, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury occurring on July 21, 1989, and based upon an average weekly wage of \$337.36, for 415 weeks of permanent partial disability compensation at the rate of \$11.25 per week for a 5% permanent partial disability making a total award of \$4,668.75.

As of December 10, 1995, there will be due and owing 333.29 weeks of permanent partial compensation at \$11.25 in the sum of \$3,749.51, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$919.24 shall be paid at \$11.25 per week for 81.71 weeks or until further order of the Director.

Claimant's contract of employment with her attorney is further subject to the provisions of K.S.A. 1989 Supp. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent 75% and the Kansas Workers Compensation Fund 25% to be paid direct, as follows:

Underwood & Shane	
Preliminary Hearing	\$104.75
Preliminary Hearing	\$ 51.85
Transcript of Proceedings	\$149.00
Maynard Peterson & Associates	
Deposition of Dr. Ellis	unknown
Angela J. Schultz	
Deposition of Dr. Jarrott	\$104.00
Barber & Associates	
Deposition of Dr. Mills	\$130.00
Court Reporting Service	
Deposition of James Molski	\$167.58

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Kendall R. Cunningham, Wichita, Kansas  
Mike Allen, Liberal, Kansas  
IBP Legal Dept., Dakota City, Nebraska  
Michael T. Harris, Wichita, Kansas  
Thomas F. Richardson, Administrative Law Judge  
Philip S. Harness, Director